

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION**

KIMBERLY M. LEWIS,

Plaintiff,

vs.

**J & M PARTNERSHIP, L.L.P.,
F & F INVESTMENTS OF ILLINOIS,
INC., AIR MAK, L.L.C., and
E. JAMES FREYBERGER,**

Defendants.

No. C07-2036

**RULING ON MOTION
TO EXTEND TIME**

This matter comes before the Court on the Motion to Extend Time to Amend Pleadings and Add/Dismiss Parties (docket number 14) filed by the Plaintiff on March 10, 2008. Plaintiff Kimberly M. Lewis requests that the deadline for adding parties and amending pleadings be extended in order to allow her to file a Motion to Amend Pleadings and Add/Dismiss Parties (attached to the instant Motion as docket number 14-3), which in turn requests that Plaintiff be permitted to amend her Complaint in accordance with an Amended Complaint and Jury Demand (also attached as docket number 14-4). Pursuant to Local Rule 7.c, the Motion will be decided without oral argument.

I. RELEVANT FACTS

On May 29, 2007, Plaintiff Kimberly M. Lewis (“Lewis”) filed a Complaint (docket number 2) against Defendant J & M Partnership, L.L.P. (“J & M”), alleging entitlement to recover under federal and state law for race discrimination and for interference with Lewis’ rights under the Family Medical Leave Act (“FMLA”). Lewis, an African American female, alleges that she was wrongfully terminated from employment because of her race and was improperly denied FMLA benefits.

On July 25, 2007, Lewis filed an Amended Complaint (docket number 4) adding three additional Defendants, including F & F Investments of Illinois, Inc. (“F & F”), Air Mak, L.L.C. (“Air Mak”), and E. James Freyberger (“Freyberger”). Among other things, the Amended Complaint added paragraph 3, which alleged:

One partner of J & M is related to E. James Freyberger, who owns other McDonald’s restaurants in Cedar Falls and Waterloo, Iowa, under a corporate name of F & F Investments of Illinois, Inc. and/or Air Mak, L.L.C. (“F & F” and “Air Mak”). When Ms. Lewis applied for work at the Main Street, Cedar Falls McDonald’s location owned by F & F and/or Air Mak after she filed her civil rights complaint against J & M, they refused to hire her, citing a pretextual reason.

The Amended Complaint alleges that after Lewis was wrongfully terminated from her employment at the LaPorte Road McDonald’s, owned by J & M, she was unlawfully denied employment at the Main Street McDonald’s, owned by F & F and/or Air Mak. The Amended Complaint adds counts for “retaliation” under federal and state law.

On October 17, 2007, Attorney Becky S. Knutson signed a Waiver of Service of Summons (docket numbers 7 and 8) on behalf of all four Defendants. The parties subsequently submitted a Proposed Scheduling Order and Discovery Plan, which was adopted by the Court and filed on December 17, 2007. *See* Scheduling Order and Discovery Plan (docket number 9). Among other things, the parties agreed to a deadline of February 22, 2008, for adding parties or amending pleadings.

Defendants filed their Answer and Affirmative Defenses (docket number 10) on December 26, 2007. Defendants responded to Paragraph 3 of the Amended Complaint as follows:

Defendants admit that E. James Freyberger owns other McDonald’s restaurants, and is related to one partner of J&M. The remainder of the allegations in Paragraph 3 are denied.

In their Affirmative Defenses, Defendants further allege that “Defendants F&M [sic] and Air Mak assert that they did not own or operate the Cedar Falls McDonald’s at which

Plaintiff sought employment, and are not proper Defendants herein.” *See Answer and Affirmative Defenses* (docket number 10) at 7.

On January 25, 2008, Attorney Matthew S. Brick filed an Appearance (docket number 13) on behalf of Defendants F & F and Freyberger. Also on that date, Mr. Brick served Lewis with the initial disclosures of F & F and Freyberger (attached to Lewis’ Reply to Resistance as docket number 16-2). Attached to the initial disclosures was a declaration sheet for insurance issued to F & F and Freyberger, identifying the Main Street location in Cedar Falls as one of the insured properties.

Lewis now concedes that F & F and Air Mak are not owners of the Cedar Falls McDonald’s franchise at issue in this case and should be dismissed as Defendants. Not surprisingly, Defendants do not object to that portion of Lewis’ Motion. Lewis further requests, however, that she be permitted to further amend her Complaint to add Freyco, Inc. (“Freyco”) as an additional Defendant. In her proposed Amended Complaint, Lewis alleges that Freyco owned the Main Street McDonald’s in Cedar Falls.

According to the instant Motion, Lewis received discovery responses from F & F and Air Mak on March 3, 2008, “establishing that a different corporate entity owns the Cedar Falls McDonald’s franchise at issue.” Lewis then filed the instant Motion, requesting that F & F and Air Mak be dismissed and that Freyco be added. Defendants argue that the request to add a defendant is untimely and should be denied.

II. DISCUSSION

A resolution of the issues raised by the instant Motion requires the Court to answer three questions: First, was Lewis’ failure to obtain an extension of the time in which to amend the pleadings a result of excusable neglect; second, has there been a showing of good cause to extend the pleadings deadline as set forth in the Scheduling Order and Discovery Plan; and third, should an amendment to the Complaint be permitted at this time?

A. Was Lewis' Failure to Obtain an Extension of the Time in Which to Amend the Pleadings a Result of Excusable Neglect?

The Scheduling Order and Discovery Plan agreed to by the parties, and adopted by the Court, established a deadline of February 22, 2008, for adding parties or amending pleadings. Lewis' instant Motion to extend the deadline was filed after the pleadings deadline had expired. FEDERAL RULE OF CIVIL PROCEDURE 6(b)(1)(B) provides that “[w]hen an act may or must be done within a specified time, the Court may, for good cause, extend the time . . . on motion made after the time has expired if the party failed to act *because of excusable neglect*.” (emphasis added) Defendants argue that Lewis' failure to act prior to the expiration of the pleadings deadline does not constitute “excusable neglect.”

In *Noah v. Bond Cold Storage*, 408 F.3d 1043 (8th Cir. 2005), plaintiff's lawsuit was dismissed after he failed to comply with a scheduling and trial order and then failed to respond to an order to show cause why the matter should not be dismissed. In considering plaintiff's Rule 60(b)(1) motion, the Court summarized the law regarding “excusable neglect.”

The term “excusable neglect” in this context is generally “‘understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence.’” To be excusable, however, the neglect must be accompanied by a showing of good faith and some reasonable basis for not complying with the rules. It is generally held that “excusable neglect” under Rule 60(b) does not include ignorance or carelessness on the part of an attorney. Neither a mistake of law nor the failure to follow the clear dictates of a court rule constitutes excusable neglect.

Id. at 1045 (all citations omitted).

In deciding a Rule 60(b) motion, the court should not “focus narrowly on the negligent act,” but instead should take into account “all relevant circumstances surrounding the party's omission.” *Union Pacific R.R. Co. v. Progress Rail Services Corp.*, 256 F.3d

781, 782 (8th Cir. 2001) (quoting *Pioneer Inv. Services Co. v. Brunswick Assoc. Ltd. P'ship.*, 507 U.S. 380 (1993)).

The inquiry is essentially an equitable one, and the district court is required to engage in a careful balancing of multiple considerations, including “the danger of prejudice to the [non-moving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.”

Id. In this regard, the Court has recognized that excusable neglect “is a somewhat elastic concept.” *Ceridian Corp. v. SCSC Corp.*, 212 F.3d 398, 403 (8th Cir. 2000) (quoting *Pioneer Inv. Services Co.*, 507 U.S. at 392).

In this case, Lewis’ counsel was apparently confused by the relationship which Freyberger had with J & M Partnership and also with F & F Investments. That confusion was apparently reinforced by an insurance document received from Defendants on January 25, 2008, naming F & F and Freyberger as insureds and apparently identifying the Main Street McDonald’s as one of the insured properties. According to an Affidavit filed by Lewis’ attorney, she researched various Secretary of State websites in an effort to identify the correct corporate party “and believed I located the correct entities.” Defendants argue, however, that Lewis should have been alerted by their affirmative defenses filed on December 26, 2007, that she had failed to identify the correct owner of the Main Street McDonald’s.

In balancing the considerations set forth in *Pioneer*, the Court finds that there is no prejudice to Freyco in this case. Apparently, Freyco is owned by Freyberger and he was aware of this lawsuit at all times. Lewis’ Motion was filed just seventeen days following the deadline for adding new parties and discovery is ongoing. The short delay should not have a significant impact on further proceedings in this case. The Court believes that Lewis’ counsel made a good faith, albeit unsuccessful, attempt to identify the appropriate corporate defendants.

“Excusable neglect at its core requires a showing of good faith and a reasonable basis for the failure to comply with the rules.” *United States v. 20660 Lee Rd.*, 496 F. Supp. 2d 1012, 1017 (S.D. Iowa 2007). After carefully balancing the considerations set forth in *Pioneer*, the Court concludes that Lewis’ failure to seek an extension of the time to amend the pleadings or add new parties prior to the expiration of the deadline was because of excusable neglect.

B. Has There Been a Showing of Good Cause to Extend the Pleadings Deadline as Set Forth in the Scheduling Order and Discovery Plan?

FEDERAL RULE OF CIVIL PROCEDURE 6(b)(1)(B) provides that “[w]hen an act may or must be done within a specified time, the court may, *for good cause*, extend the time . . . on motion made after the time has expired if the party failed to act because of excusable neglect.” (emphasis added) Similarly, the local rules provide that the deadlines established by the Scheduling Order and Discovery Plan will be extended only upon “a showing of good cause.” See Local Rule 16.f. See also FED. R. CIV. P. 16(b)(4) (“A schedule may be modified only for good cause and with the judge’s consent.”). Accordingly, the Court must determine whether or not “good cause” exists for extending the previously established deadline for adding new parties and amending pleadings.

Lewis argues that good cause exists to extend the deadline for adding parties and amending pleadings, since she did not discover the true corporate ownership of the Main Street McDonald’s until she received Defendants’ discovery responses on March 3, 2008, ten days after the pleadings deadline expired. Defendants argue that good cause does not exist because Lewis was alerted in Defendants’ Answer that “F & M” and Air Mak did not own or operate the Main Street McDonald’s in Cedar Falls.

In considering the “good cause” standard found in Rule 16(b), the Court in *Engleson v. Little Falls Area Chamber of Commerce*, 210 F.R.D. 667 (D. Minn. 2002), observed:

The “good cause” standard is an exacting one, for it demands a demonstration that the existing schedule “cannot reasonably

be met despite the diligence of the party seeking the extension.” It hardly bears mention, therefore, that “carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief.” Nor does the question of good cause turn on the existence or absence of prejudice to the non-moving party.

Id. at 668-669 (all citations omitted).

In this case, despite a good faith effort, Lewis’ attorney was unable to ascertain the correct corporate owner of the Main Street McDonald’s. Her efforts in this regard may have been complicated by the interrelationship between J & M, F & F, Freyberger, and Freyco. Insurance information received from Defendants in their initial 26(a) disclosures may have added to the confusion. After considering all of the circumstances, the Court concludes that good cause exists for an extension of the deadline to add parties and amend pleadings.

C. Should an Amendment to the Complaint be Permitted at This Time?

Absent consent of the opposing party, a party may amend its pleading only by leave of court. FED. R. CIV. P. 15(a)(2). However, “[t]he court should freely give leave when justice so requires.” *Id.* Thus, the FEDERAL RULES OF CIVIL PROCEDURE liberally permit amendments to pleadings. *Dennis v. Dillard Dept. Stores, Inc.*, 207 F.3d 523, 525 (8th Cir. 2000). The right to amend is not, however, without limitation.

[T]here is no absolute right to amend and a court may deny the motion based upon a finding of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies in previous amendments, undue prejudice to the non-moving party, or futility.

Baptist Health v. Smith, 477 F.3d 540, 544 (8th Cir. 2007) (citing *Doe v. Cassel*, 403 F.3d 986 (8th Cir. 2005)).

In this case, the proposed amendment will not result in undue delay. Discovery is ongoing and the addition of another defendant at this stage of the proceedings should not affect the trial ready date. There is no showing that in seeking an amendment to the

pleadings, Lewis is acting in bad faith or with a dilatory motive. In addition, since Freyberger is the principal in Freyco and has been a party to this action throughout, an amendment to the pleadings will not cause undue prejudice. Therefore, the Court finds that the Motion to Amend Pleadings (attached to the instant Motion as docket number 14-3) should be granted.

III. ORDER

IT IS THEREFORE ORDERED as follows:

1. The Motion to Extend Time to Amend Pleadings and Add/Dismiss Parties (docket number 14) is hereby **GRANTED**. The deadline for filing a motion to add parties and amend pleadings is hereby **EXTENDED** to **March 10, 2008**.

2. The Motion to Amend Pleadings and Add/Dismiss Parties (docket number 14-3) filed by Plaintiff on March 10, 2008, is hereby **GRANTED**. The Clerk of Court shall detach and separately docket the Amended Complaint and Jury Demand (docket number 14-4) filed by Plaintiff.

DATED this 4th day of April, 2008.



JON STUART SCOLES
United States Magistrate Judge
NORTHERN DISTRICT OF IOWA